87 - 1350

No.

No.

In the

Supreme Court of the United States

OCTOBER TERM 1987

O.N.E. SHIPPING, LTD.,

Petitioner,

against

FLOTA MERCANTE GRANCOLOMBIANA, S.A., ANDINO CHEMICAL SHIPPING, INC., and MARITIMA TRANSLIGRA, S.A.,

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

1. Was the Second Circuit Court of Appeals correct in applying the act of state doctrine and refusing to hear the merits in a case where the U.S. State Department has specifically refused to intervene on behalf of the foreign government on the very laws which the Circuit Court found beyond its ability to review and where there was no testimony with respect to any possible adverse diplomatic efforts?

2. Was the Second Circuit Court correct in refusing to follow, or improperly distinguishing, the law pronounced by this Court in defining the justiciability of antitrust complaints brought against companies whose anticompetitive activity was, at least in part, assisted by foreign legislation?

3. When the Federal Maritime Commission as the administrative tribunal in charge of regulating shipping has determined that investigation of foreign legislative decrees affecting shipping is an integral part of its function, should this Court refuse to hear the merits of a case involving such decrees on grounds of the act of state doctrine?

4. Should the expansion of the state compulsion doctrine as set forth in the Second Circuit Court of Appeals' decision be allowed to stand in light of this Court's pronouncement on the limited applicability of that doctrine?

5. Are the acts of a commercial enterprise found to be an agency or instrumentality of a foreign state beyond the reach of the Court's review on the grounds of the act of state doctrine?

Corporate Disclosure

O.N.E. Shipping, Ltd., is a wholly owned subsidiary of Seastriders, Inc., which is owned by private individuals. O.N.E. Shipping, Ltd., has no subsidiary or affiliated corporations.

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner O.N.E. Shipping, Ltd., prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit entered in this matter.

Opinions Below

Petitioner seeks review of the opinion rendered in *O.N.E. Shipping Ltd. v. Flota Mercante Grancolombiana, S.A., Andino Chemical Shipping Inc., and Maritima Transligra, S.A.*, 830 F.2d 449 (2d Cir. 1987) [p. A1] Cardamone, J., dissenting [p. A14] rehearing denied ___ F.2d ___ (November 10, 1987), [p. A40] affirming the Decisions issued May 22, 1986 and October 22, 1986 of the Southern District of New York (Duffy, J.) [p. A25, A35] and revising so

much of the Decision dated October 22, as imposed sanctions on plaintiff petitioner O.N.E. Shipping Ltd.

Jurisdictional Grounds

The opinion and judgment of the Second Circuit were decided and entered on October 1, 1987. A timely petition for rehearing and suggestion for a hearing *in banc* was denied and entered on November 10, 1987.

Petitioner invokes this Court's jurisdiction pursuant to 28 U.S. C. § 1254(1).

Appeal to the Circuit Court of Appeals for the Second Circuit was taken pursuant to 28 U.S.C. § 1291 in that the order of the District Court in dismissing plaintiff's cause was a final order as contemplated by the statute.

Factual Background

For over ten years, O.N.E. Shipping ("O.N.E.") has been engaged in actively opposing the various attempts of Flota Mercante Grancolombiana, S.A. ("Flota"), Andino Chemical Shipping, Inc. ("Andino") and Maritima Transligra, S.A. ("Transligra") to monopolize the liquid bulk trade between the United States Gulf ports and the Atlantic and Pacific ports in the Republic of Colombia.[1] Since 1976, these three ocean shipping companies have sought

[1] The trade of specialized chemicals and edible oils carried onboard parcel tankers who transport these cargoes in bulk has been referred to herein as the "LBC" trade, as an acronym of Liquid Bulk Cargo. That term, or liquid bulk trade, or parcel tanker trade all refer to the same business which is distinguished from the crude bulk oil trade in that the ocean vessels are much more sophisticated. Although the trade does not transport the same volume as bulk petroleum, its total values are significant, amounting to over $100 million annually. In the decade 1976 to 1986 total values of cargoes shipped from the U.S. Gulf to Colombia aggregated $1.213 billion.

to have their cooperative working agreements[2] approved and sanctioned[3] by various executive and judicial tribunals in the United States. First O.N.E's opposition took the form of filing a suggestion that the agreements as filed with the Federal Maritime Commission did not constitute the entire agreements;[4] then after the FMC conditionally disapproved the agreements on May 25, 1978, as being *per se* violations of the Sherman Act,[5] O.N.E. intervened in the formal proceedings held before Administrative Law Judge Charles E. Morgan. After conducting numerous hearings over a span of five years, and consuming thousands of pages of transcripts, ALJ Morgan issued his initial Decision, reaffirmed the conditional disapproval,

[2] At first, in 1973, there was only one agreement between Flota and Andino for the entire U.S. Gulf/Colombia LBC trade. However, in 1976, the trade was broken up among the participants and the Atlantic ports were serviced by an agreement between Flota and Andino and the Pacific ports of Colombia were serviced under an agreement between Flota and Transligra. The 1973 agreement was never made public in the United States, and only the 1976 agreements were ever submitted for approval.

[3] Prior to 1984 any ocean carrier who entered into an agreement with other carriers or other persons subject to the Shipping Act of 1916 were required to file their agreements for approval [46 U.S.C. § 801, *et seq.*], and, if approved, these agreements were granted exemption from the prohibitions of the Sherman Act [15 U.S.C. 1 *et seq.*]. The Shipping Act of 1984 [Pub. L. 98-237, 98 Stat. 67] did not change antitrust culpability of parcel tanker operations, since they were specifically excepted from the 1984 Act, 46 U.S.C. 1702(6)(B).

[4] This suggestion later proved correct, when discovery conducted during the proceedings elicited that there were two agreements: one a public agreement previously filed with Colombian maritime authorities, and another a private agreement which was filed with no one, and was only filed with the FMC upon threat of dismissal of the application for approval.

[5] An Order of Investigation was entered establishing Docket 79-2 and Docket 79-3.

held the agreements *per se* violations of the Sherman Act and found that the proponents had not met their burden to show that their cooperative working agreements fulfilled a serious transportation need.[6] Again Flota, Andino and Transligra appealed, this time to the full Commission, and again O.N.E. opposed the appeal and filed its objections. The Commission (Judge Moakley dissenting) adopted and expanded the effect of the Initial Decision of the ALJ, found the cooperative working agreements to have "significant anti-competitive effects, to be contrary to the public interest and detrimental to the commerce of the United States.[7]

Significantly, the FMC rejected Flota's plea that the agreements be approved so as to avoid frustrating Colombian shipping policy:

> Secondly, there is not support in the record for Proponents' argument that the Agreements' disapproval would frustrate the intent of the sovereign state of Colombia by preventing Flota from providing a Colombian-flag liquid bulk service. Clearly, *disapproval would not preclude Flota from making ad hoc arrangements with any carrier* or vessel owner desiring to compete for Flota's cargo. (emphasis supplied)

After three determinations by U.S. shipping authorities, O.N.E. filed its antitrust complaint alleging a concerted refusal to deal, conspiracy to exclude competitors, unlawful exclusive dealing, conspiracy to fix prices, conspiracy to divide markets and allocate customers and a conspiracy to monopolize. The gravamen of plaintiff's antitrust complaint was that, by entering into the cooperative working

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[6] Docket 79-2 [Agreement 10293] at —FMC—, 22 S.R.R. 135 and Docket 79-3 [Agreement 10295].

[7] Docket 79-2; Docket 79-3 at —FMC—, 22 S.R.R. 965.

agreements, defendants Flota, Andino and Transligra as a group were able to make use of the Colombian cargo reservation scheme,[8] which none of them could have done singly. Flota did not have any Colombian flag parcel tankers, and the third flag vessels of Andino and Transligra could not become "Colombian" without the cooperative working agreement. As a group, O.N.E. alleged in its complaint, these defendants were able to fix prices, allocate markets and prevent plaintiff from entering the trade because a refusal to deal (even despite the FMC's admonition that Flota could make "ad hoc" arrangements to take the place of the disapproved agreements. Specifically, O.N.E. alleged that Flota's refusal to deal precluded O.N.E. from entering the Colombian trade under a similar cooperative working agreement which it had made with a U.S. flag carrier (Lykes Bros. S.S. Co.)

Prior to filing an answer, Flota, Andino and Transligra filed motions to dismiss for lack of subject matter jurisdiction, and for lack of jurisdiction based on international comity and plaintiff cross moved for summary judgment on the grounds of *res judicata* since all issues had been raised, litigated and adjudicated by the agency entrusted with resolution of the antitrust aspects of the shipping agreements.[9] In dismissing O.N.E.'s complaint at the pleading stage, the District and Circuit Courts both found that Flota was an "agency or instrumentality" of the Colombian government.[10] From that vantage point, the

[8] After the agreements were disapproved, the defendants recast their agreement into a joint venture under a presently operating company called Ligracol S.A.

[9] Flota, Andino and Transligra also moved to dismiss the complaint on the substantive grounds of failure to state a claim and time bar, but these issues, as plaintiff's cross motion, were never reached by the District Court in light of the jurisdictional dismissal.

[10] Appendix, page A4.

District Court went on to conclude that, *ipso dixit*, that adverse consequences in the political and/or diplomatic realm would occur if relief were granted to O.N.E. on its antitrust claim. The majority of the Second Circuit used the instrumentality finding as a springboard to the application of the "act of state" doctrine as a basis for prohibiting relief. Cardamone, J., dissented on the ground that the majority's decision to decline jurisdiction was in direct conflict with controlling Supreme Court precedents and therefore voted to reverse and remand the case to the District Court for proceedings on the merits.[11]

THE WRIT SHOULD BE GRANTED FOR THE FOLLOWING REASONS:

1. The Decision of the Majority Against Justiciability is in Direct Conflict with Two Decisions of This Court.

As the dissent filed by Cardamone, J., in this case so clearly illustrates, the majority's decision to decline antitrust jurisdiction on the grounds of the existence of foreign interests is squarely contrary to existing precedents of the Supreme Court:

> "Our highest court has twice addressed the effect of United States antitrust laws on anticompetitive conduct allegedly aided by foreign protectionist legislation. In both cases it held that such assistance did not oust federal courts from jurisdiction on comity grounds."

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[11] In addition, Cardamone, J., also found that the service of shipping is an "import" in so far as U.S. shippers competing for tonnage to Colombia are concerned. Thus, subject matter jurisdiction over O.N.E.'s complaint must prevail against attack based on the Foreign Trade Antitrust Improvements Act of 1982 [15 U.S.C. § 6a]. The majority does not touch on the issue at all in light of its decision to decline jurisdiction on comity and act of state grounds, and the District Court assumed jurisdiction under the FTAI Act due to O.N.E.'s nexus to the United States.

O.N.E. Shipping Ltd. v. Flota Mercante Grancolombiana, 830 F.2d 449, 457 (2d Cir. 1987). As Judge Cardamone correctly observed, the majority's opinion was based on the cargo reservation law of Colombia and that " . . . seems to me insufficient to preclude jurisdiction under controlling Supreme Court precedents." 830 F.2d at 457.

That discriminatory legislation is seized upon by the parties to the conspiracy, will not take the anticompetive conduct out of the realm of justiciability. In *United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927), a private commercial entity combined with a public agency of Mexico to make use of foreign taxing legislation to drive all competitors out of a market, leaving it to the monopolistic control of the defendant Sisal. Very much like the Colombian cargo reservation laws here involved, the Mexican taxing laws, standing by themselves, could not have effected the monopoly, nor could the private commercial banks have done so, however, by a combination of the laws and the conspiracy, a virtual monopoly was sustained.

The doctrine of act of state was very much alive when *Sisal, supra*, was decided [see, *Underhill v. Hernandez*, 168 U.S. 250 (1897); *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918); *Ricaud v. American Metal Co.*, 246 U.S. 304 (1918)], yet the Court never alluded to it. This could be partially due to the fact that, by bringing the action, the United States government was making a positive statement that it did not consider judicial scrutiny of the Mexican laws embarrassing; and such consideration would be consistent with our government's rejection of the Colombian request in this instance to stop the initial Federal Maritime investigation.[12]

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[12] Although the majority notes that the "Colombian Government has repeatedly made known to the United States Department of State, as well as to the Federal Maritime Commission, its strong support for the cargo reservation laws . . ." the majority neglects to note that in all instances, the United States Department did nothing to assist the government or to stop the administrative or legal proceedings. In fact the cargo reservation policies of Colombia were roundly condemned by the FMC in its findings in the proceedings of Actions to Adjust or Meet Conditions Unfavorable to Shipping in the United States/Colombia Trade, issued May 26, 1987, 52 Fed. Reg. 20119-20124.

More recently, this Court rejected an assault on its antitrust jurisdiction in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962), even though the subject of the monopoly, the sale of vanadium in Canada, was controlled by a company that had been appointed by the Canadian government as its exclusive purchasing agent. In rejecting a contention that the existence of the foreign legislation mandated a declination of jurisdiction, this Court accented the fact that it was not the law but the unlawful scheme that was the touchstone of the antitrust violation.

The Circuit Court in *O.N.E. Shipping, supra,* at 453 distinguished and dismissed *Sisal* and *Union Carbide* in a footnote on the grounds that both cases only related to monopoly of domestic trade by U.S. citizens conducting their schemes in the United States. That analysis represents a distinction without a difference; in shipping, the laws keeping open competition on the seas has historically always been interpreted to aid the "third flag carriers" with substantial U.S. connections and operating in the United States trade, since their existence assists those U.S. companies that are in need of purchasing transportation services as part of their ability to compete.[13]

As noted in the dissent, the shippers of cargo to Colombia are all American, and their ability to compete against European or Asian manufacturers of the same products in the Colombian market is directly dependent upon freight rates set by the competition among carriers servicing that market.[14] Thus, the monopoly has very definite domestic

[13] See Actions to Adjust or Meet Conditions Unfavorable to Shipping in the United States/Colombia Trade, 52 Fed. Reg. 20119; Actions to Adjust, etc., United States/Peru, 52 Fed. Reg. 46356.

[14] The Federal Maritime Commission in both the initial and the final decisions found, as a fact, that the Flota, Andino and Transligra monopoly artificially raised freight rates and made it impossible for U.S. shippers to use their contracts of affreightment which they had to other Latin American countries.

effects and even the majority does not deny the existence of the direct forseeable effects test as set out in *United States v. Aluminum Co. of America,* 148 F.2d 416 (2d Cir. 1945). This case is not a case involving foreign interests entirely conducting business abroad with only casual contacts in the United States.[15]

Judicial restraint from exercising jurisdiction over conduct which involves foreign discriminatory laws has previously only been invoked under the rubric of act of state if the foreign law or political act is the causal connection between plaintiff's claim and defendants' conduct; *Hunt v. Mobil Oil Corp.,* 550 F.2d 68 (2d Cir. 1977). In this case the exclusionary conduct of Flota, Andino and Transligra would have been actionable irrespective of the existence of any legislation. The fact that the voluntary conduct derived its strength from foreign legislation does not bring the legislation itself into judicial focus. *Sisal, supra; Union Carbide, supra.* Plaintiff is not claiming that the laws of Colombia deprived it of access, since, prior to the anti-competitive association among Flota, Andino and Transligra, O.N.E. had free and unencumbered access in Colombia despite the existence of the cargo reservation laws.

2. Applying Act of State Here is Contrary to this Court's Practice to Apply it Only at the Request of the Government.

In the several cases which have employed the act of state doctrine, the Court has followed the request of the United States Executive in determining whether or not to apply the doctrine. Compare *Banco Nationale de Cuba v. Sabbatino,* 376 U.S. 398 (1964) and *First National City Bank v. Banco Nacional de Cuba,* 406 U.S. 759 (1972). See also, *Williams v. Curtiss-Wright Corp.,* 694 F.2d 300 (3d

[15] The dismissal of plaintiff's claims in *Timberlane [See Timberlane Lumber Co. v. Bank of America, N.T. & S.A.,* 549 F.2d 597 (9th Cir. 1976)] rested entirely on the fact that all the significant activities occurred in Costa Rica and it was only by chance that one of the entities was financed in the U.S.

Cir. 1982) [assuming jurisdiction in the absence of any indication by the State Department that it took a position]; *Kalamazoo Spice Extraction Co. v. Prov. Military Gov't of Soc. Ethiopia,* 729 F.2d 422 (6th Cir. 1984) [merits of dispute decided where Executive intervened asking enforcement of treaty]; *Allied Bank International v. Banco Credito Agricola,* 757 F.2d 516 (2d Cir. 1985) [reversing prior declination of jurisdiction based on the Executive's "elucidation of its position" against application of the doctrine].

In this case, rather than an administrative pronouncement in favor of abstention every overt and explicit act by the United States government has been against the application of the Act of State doctrine. Twice during the course of the Federal Maritime proceedings, the government of Colombia sought to have the State Department invoke its power to have the investigation into Colombia's discriminatory practices stopped. Twice the United States government refused the offer. Twice the administrative department responsible for overseeing shipping matters actively reviewed and soundly condemned the Colombian cargo reservation laws. The administrative laws judge and the full commission rejected sanctioning the cooperative working agreement on the grounds that the agreement was a *per se* violation of the antitrust laws and served no transportation need. Thereafter, in proceedings initiated by O.N.E. under 46 CFR 585.8 specifically asked the administration to rule that the cargo reservation laws of the Republic of Colombia were a condition unfavorable to shipping in the foreign trade of the United States. The Commission had no hesitation in fully reviewing and condemning the Colombian cargo reservation laws.[16]

[16] The Second Circuit opinion curiously notes that O.N.E. filed the application, and that O.N.E. withdrew the application without ever noting that in between the FMC threatened cancellation of the tariffs of Flota unless the discriminatory practice ceased. The proceedings were initiated by O.N.E. on the grounds that Colombia agreed to make competition of the

(*footnote continued on following page*)

This attitude of squarely confronting discriminatory legislation that affects shipping to and from the United States (irrespective of whether the vessels are United States or Third Flag), has been continually restated in Actions to Adjust or Meet Conditions Unfavorable to Shipping in the United States/Peru Trade, 52 Fed. Reg. 46,356; Actions, etc., Taiwan, 52 Fed. Reg. 46,505.

For the Second Circuit to have trepidation for stepping into an area in which the Federal Maritime Commission has no problem seems incongruous. To allow this decision to stand is to state that the courts can independently determine whether the government might be embarrassed, even against the administration's emphatic statement that it will not be embarrassed by a frontal assault on a foreign country's discriminatory shipping legislation.

3. The Majority Decision of the Second Circuit Court is in Conflict with the Third Circuit.

The Act of State defense has been historically applied only in expropriation cases where the critical acts have all taken place within the boundaries of the foreign state, and then only when the United States government has taken a position in favor of declination of jurisdiction, *Mannington Mills, Inc. v. Congoleum Corp.*, 295 F.2d 1287, 1293 (3d Cir. 1979). And since the question is not one of jurisdiction, but rather one of justiciability, the burden of proving application of the doctrine is on the party seeking to have it applied. See *Mannington Mills, supra*, at 1293:

(*footnote continued from preceding page*)
unreserved portion more freely available to competition. Furthermore, the FMC made it plain in its decision accepting withdrawal [28 Fed. Reg. 28316] that it was retaining jurisdiction to monitor further conduct by reopening the proceedings.

> "One asserting the defense [of act of state] must establish that the foreign decree was basic and fundamental to the alleged anti-trust behavior and more than merely peripheral to the overall illegal course of conduct."

The rationale for the rule is that dismissal on the grounds of act of state is not a jurisdictional dismissal, but rather a declination to exercise that jurisdiction.[17]

In *O.N.E. Shipping, supra,* at 452, 453, the Court not only made no finding of proof presented by the defendants, it merely assumed it from "reading the pleadings." Since the FMC[18] decision (a copy of which was annexed to and incorporated into the complaint) which disapproved the Flota/Andino/Transligra agreements specifically held that the monopolistic activity came about as a result of the combination of the Agreements and the Colombian law, it is difficult to perceive that finding. To the extent that the decision places the burden on O.N.E. to show the absence of an act of state, the Second Circuit's opinion runs counter to the obligations of a movant under Rule 12(b)(1) or 12(b)(6) of the Federal Rules of Civil Procedure. *Mannington Mills, supra; Bell v. Hood,* 327 U.S. 678 (1946).

4. Application of the Doctrine of Foreign Compulsion is Contrary to Accepted Authority.

This Court has stated that the test of sovereign compulsion requires either approval of anticompetitive conduct

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[17] Initially defendants brought their motion before Judge Duffy on the basis of subject matter jurisdiction under the Export Trading Company Act. *Public Laws* 97-290, 96 Stat. 1233, particularly Title IV at Foreign Trade Anti Trust Improvements Act of 1982 amended Sect. 7 of the Sherman Act, 15 U.S.C. §6a. However, that issue was disposed of by Judge Duffy in a footnote and assumed by the Second Circuit without comment. The only extensive analysis of the ETC Act is by Judge Cardamone in his dissent wherein he finds that the act does not preclude O.N.E. from bringing this litigation.

[18] Docket 79-2 & 79-3, —FMC—, 22 S.R.R. 965.

by the foreign sovereign or the imposition of a penalty for failing to observe a local law requiring the conduct. *Union Carbide, supra,* at 707. Absent such a finding, declination of jurisdiction on that ground is improper.

Although this Court did not reach the issue of sovereign compulsion in the case of *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*, 106 S.Ct. 1348 (1986), the issue was briefed by the government in its *amicus* brief. The test urged by the Department of Justice as to whether foreign compulsion should apply was stated as follows [Brief of the United States as Amicus Curiae Supporting Petitioners, p. 21-22]:

> "We are not prepared at this time to suggest that there is any application of the sovereign compulsion defense that would be appropriate in the absence of actual compulsion by the foreign government. *Surely the mere fact that a trade restraint is consistent with the law of a foreign national's home state is not in itself a defense to an antitrust violation.* Nor should it lightly be inferred that Congress intended to defer to foreign sovereigns to prescribe the norms for the volitional conduct of private persons concerning trade restraints directly affecting competition in the United States. This question, of course, need not be addressed by the Court until it is squarely presented in a particular factual setting." (emphasis supplied)

In light of the Second Circuit's use of foreign compulsion as the basis for dismissing an antitrust suit brought against defendants who used (but were not compelled to use) the discriminatory legislation of the Republic of Colombia, the issue is thus squarely presented in a factual setting where the Court must resolve it either as a separate defense or as part of the "balancing" of *Timberlane* or *Mannington Mills.*

CONCLUSION

The Petition for a Writ of Certiorari Should Be Granted.

Respectfully submitted,

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Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 866—August Term 1986

(Argued February 26, 1987 Decided October 1, 1987)

Docket No. 86-7988

O.N.E. SHIPPING LTD.,

Plaintiff-Appellant,

—v.—

FLOTA MERCANTE GRANCOLOMBIANA, S.A., ANDINO CHEMICAL SHIPPING, INC., and MARITIMA TRANSLIGRA, S.A.,

Defendants-Appellees.

Before:

KAUFMAN and CARDAMONE, *Circuit Judges*
and POLLACK, *District Judge**

* Hon. Milton Pollack, Senior Judge, United States District Court for the Southern District of New York, sitting by designation.

Opinion of the Court of Appeals

O.N.E. Shipping Ltd. appeals from the May 22, 1986 dismissal of its antitrust action by the United States District Court for the Southern District of New York (Duffy, J.) on the ground of lack of subject matter jurisdiction under the doctrine of international comity. It also appeals from the district court's imposition of Rule 11 sanctions.

Affirmed in part; reversed in part.

Judge Cardamone dissents in a separate opinion.

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EDWARD SCHMELTZER, Washington, D.C. (Schmeltzer, Aptaker & Sheppard, Washington, D.C., of counsel), *filed brief for Defendants-Appellees Andino Chemical Shipping and Maritima Transligra.*

POLLACK, *Senior District Judge*:

This appeal invokes the judicially created act of state doctrine on the anti-competitive effect of a foreign sovereign's cargo reservation laws—the laws of the Republic of Colombia—which require that 50% of licensed imports of liquid bulk cargo ("LBC") be transported on Colombian owned vessels, or on vessels chartered by a Colombian company.

The district court dismissed this suit brought under the Sherman Antitrust Act, 15 U.S.C. Sections 1, 2 (1982), on the ground that a federal court should not exercise jurisdiction hereof because "Colombian interests outweigh whatever antitrust enforcement interests the United States may have in this case as a matter of law." We affirm the dismissal.

Following the dismissal, appellant filed a motion under Rules 59 and 60 of the Federal Rules of Civil Procedure for reconsideration of the court's findings in light of allegedly new evidence and for an amendment of the judgment to reflect the disposition of its motion for a partial summary judgment. The court rejected the motions and sanctioned the appellant $500 under Rule 11. We reverse the order for sanctions.

BACKGROUND

In the late 1960s, Colombia passed a series of "Cargo Reservation Laws." The purpose of these laws was to favor Colombian shipping companies and the Columbian economy by requiring that imports and exports of certain types of cargo be transported exclusively by Colombian

carriers. After 1969, those laws required that the first 50% of each licensed shipment imported into Colombia on trade routes served by Colombian carriers be transported on Colombian-owned vessels or on vessels chartered by a Colombian company. As the result of a delicate compromise between the United States and Colombia, U.S. flag lines were not subject to the protection laws.

Appellant O.N.E. Shipping Ltd. ("O.N.E."), a Bermuda corporation, and its predecessor in interest, Overseas Liquid Gas, Inc., a U.S. corporation, had offered regular liquid bulk cargo tanker service from U.S. gulf ports to Central and South America. Before 1973 there were no Colombian vessels capable of carrying LBC, so shipping to Colombia of this product was unaffected by the Colombia cargo reservation laws. This situation changed in 1973 and thereafter.

Appellee Flota Mercante Grancolombiana, S.A. ("Flota"), a Colombia shipping line substantially owned by the National Federation of Coffee Growers of Colombia, is a public organization and is "an agency or instrumentality" of the Colombian Government within the meaning of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. Section 1603(b).[1] Flota is Colombia's national line. Flota had no specially equipped LBC tankers of its own.

In 1973, to accommodate the needs of Colombian importers, Flota entered into a chartering agreement (revised in 1976) with appellee Andino Chemical Shipping, Inc., a Panamanian corporation and carrier of LBC, to handle Colombia's Atlantic coast trade.

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1 By law, profits from Flota's operations are used to promote industrial development and to build warehouses, roads, schools, hospitals and power and telephone facilities.

In 1976, Flota entered into a similar chartering agreement with appellee Maritima Transligra, S.A. ("Transligra"), an Ecuadoran corporation, to charter the latter's tankers for use in Colombia's Pacific coast trade.

As required by Colombian law, Flota's chartering agreements were filed with and approved by the Colombian Government, enabling the non-Colombian tankers to receive the preferences accorded to Colombian flag vesels under the cargo reservation laws.[2] Together, the three appellees have captured up to 89% of the shipping imports of LBC into Colombia and O.N.E. has been virtually shut out therefrom.

As mentioned above, following a bilateral negotiation, no restrictions were placed by Colombia on the carriage of products imported from the United States if carried on United States flag vessels.

In April 1977, Flota, Andino and Transligra sought approval of their chartering agreements from the United States Federal Maritime Commission ("FMC") which would provide an exemption from U.S. antitrust laws. The FMC conditionally disapproved the agreements and subsequently conducted an investigation and a hearing. On May 23, 1983, the Administrative Law Judge ("ALJ") also disapproved the agreements. The ALJ found that Flota had attained near monopoly control over the LBC service to Colombia and that the agreements were prospectively unlawful. On appeal, the FMC affirmed the ALJ's order of disapproval and ruled that the agreements were anticompetitive, detrimental to United States commerce, contrary to the public interest and artificially

2 Authorization of the agreements was granted by the Director General of Maritime and Port Matters—a rear admiral in the Colombian Navy and an official within the Ministry of National Defense.

increased transportation rates. The FMC ordered appellees to cease and desist. With these rulings in hand O.N.E. brought this antitrust action in the district court below.

O.N.E. charges appellees with unlawful concerted refusal to deal, conspiracy to exclude competitors, unlawful exclusive dealing, conspiracy to fix prices, conspiracy to divide markets and allocate customers, and attempt and conspiracy to monopolize.

DISCUSSION

O.N.E.'s antitrust suit represents a direct challenge to Colombia's cargo reservation laws and to the legality of appellees' space chartering agreements under those laws. The laws were designed to promote the development of a strong Colombian merchant marine and to assist Colombia's economic development.

Among other purposes, the cargo reservation laws enable the Colombian Government to monitor the allocation of the resources of Colombian shipping companies, to determine whether particular trade routes could prove harmful to the country's economy and to consider whether an applicant would provide effective, regular and continuous service.

The Colombian Government has repeatedly made known to the United States Department of State, as well as to the Federal Maritime Commission, its strong support for the cargo reservation laws and the chartering agreements thereunder among the appellees.

Applying the balancing tests of *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*, 549 F.2d 597 (9th

Cir. 1976) and *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979) the district court concluded that because of Colombia's strong interest in its protectionist legislation and because of the Colombian government's ownership interest in Flota through the National Federation of Coffee Growers, there would be probable adverse effects upon our foreign relations were it to assert jurisdiction over this suit. The comity balancing test has been explicitly used in this Court. *See Joseph Muller Corp. Zurich v. Societe Anonyme de Gerance et D'Armament*, 451 F.2d 727 (2d Cir. 1971) (per curiam), *cert. denied*, 406 U.S. 906 (1972).[3]

In an effort to provide a single standard to determine whether American antitrust laws apply to a given extra-territorial transaction, Congress enacted the Foreign Trade Antitrust Improvements Act of 1982, Pub. L. No. 97-290, 96 Stat. 1246 (codified at 15 U.S.C. Section 6a) [hereinafter referred to as the "Act"].

Given the dismissal on comity grounds, the district judge did not decide whether the complaint should be dismissed under the "Act", although he did state that the Act "would not appear to provide a basis for refusing to exercise jurisdiction over this action."

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3 A well-known definition of comity was enunciated by the Supreme Court:

> "Comity," in the legal sense, is neither a matter of absolute obligation on the one hand, nor of mere courtesy and good will upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

Hilton v. Guyot, 159 U.S. 113, 163-64 (1895).

Congress left it to the courts to decide when to employ notions of abstention from exercising jurisdiction in extraterritorial antitrust cases. Ninety years ago, the United States Supreme Court enunciated the American version of the act of state doctrine as follows:

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

Underhill v. Hernandez, 168 U.S. 250, 252 (1897).

In the landmark case of *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), the Supreme Court analyzed the significant policy considerations and "constitutional underpinnings" of the doctrine, noting that no case subsequent to *Underhill* had manifested any retreat therefrom. 376 U.S. at 416, 421-23. In addition to *Sabbatino* and *Underhill*, see *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918), and *Ricaud v. American Metal Co.*, 246 U.S. 304 (1918).

In essence, the act of state doctrine is a principle of law designed primarily to avoid judicial inquiry into the acts and conduct of the officials of the foreign state, its affairs and its policies and the underlying reasons and motivations for the actions of the foreign government. Such an inquiry is foreclosed under the act of state doctrine, *Hunt v. Mobil Oil Corp.*, 550 F.2d 68, 73 (2d Cir. 1977), *cert. denied*, 434 U.S. 984 (1977); and this is true regardless of whether the foreign government is named as a party to

the suit or whether the validity of its actions are directly challenged in the pleadings. *International Ass'n of Machinists v. OPEC*, 649 F.2d 1354, 1359 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982).

Although the district court engaged in the broader analysis of the possible adverse effects upon foreign relations were jurisdiction to be asserted, the long established act of state doctrine calls upon courts to make a preliminary assessment, on the record before it, of "the likely impact on international relations that would result from judicial consideration of the sovereign's act." *Allied Bank Int'l v. Banco Credito Agricola de Cartago*, 757 F.2d 516, 520-21 (2d Cir.), *cert. dismissed*, 473 U.S. 934 (1985). This Court has made it clear that this is a legitimate exercise of an Article III court, not to be controlled by the expressed view of the executive branch in a given case. As we stated in *Allied Bank*:

> This estimation may be guided but not controlled by the position, if any, articulated by the executive as to the applicability *vel non* of the doctrine to a particular set of facts. Whether to invoke the act of state doctrine is ultimately and always a judicial question.

Id. at 521 n.2. *Cf. Republic of the Philippines v. Marcos*, 806 F.2d 344, 357-60 (2d Cir. 1986).

O.N.E. contends that the cargo reservation laws were "implemented [by Colombia] under the manipulative guidance of Flota"; that "commercially determined carrier relationships" should not be replaced by "Colombian-government dictated relationships"; that its "challenge in this proceeding does not so much address Colombia's cargo reservation laws per se as it does

appellees' manipulation of these laws"; and that Flota has "manipulate[d] the cargo reservation laws so as to carve out a monopoly for itself and exclude all competition."

O.N.E.'s allegations make clear that its antitrust suit is premised on contentions that it was harmed by acts and motivations of a foreign sovereign which the district court would be called on to examine and pass judgment on. *See International Ass'n of Machinists v. OPEC*, 649 F.2d 1354, 1358-59 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982).

When the causal chain between a defendant's alleged conduct and plaintiff's injury cannot be determined without an inquiry into the motives of the foreign government, claims made under the antitrust laws are dismissed. *Hunt, supra; Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92, 108-12 (C.D. Cal. 1971), *aff'd*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972); *Clayco Petroleum Corp. v. Occidental Petroleum Corp.*, 712 F.2d 404, 406-08 (9th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984). Furthermore, where as here the conduct of the appellees has been compelled by the foreign government they are entitled to assert the defense of foreign government compulsion and the act of state doctrine is applicable.[4]

Colombia's interest in this action has not been confined to Flota itself; the liquid bulk cargo service of Flota,

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4 The agreements in question were entered into by foreign parties, approved by the government of Colombia, and relate to commerce into Colombia.

The two Supreme Court cases relied on by Judge Cardamone in his dissent, on the other hand, both related to alleged conspiracies entered

Andino and Transligra has been important to Colombia's economy, and the Colombian government has so represented.

O.N.E.'s "antitrust" claims reflect dissatisfaction with Colombia's cargo reservation laws, not with appellees' space chartering agreements. Congress, however, recognizing the particular sensitivity of such challenges to a foreign sovereign's shipping regulations, has provided a separate proceeding before the Federal Maritime Commission ("FMC") to resolve such disputes. O.N.E. itself recently instituted such a proceeding.

On May 29, 1986, O.N.E. filed a petition before the FMC under Section 19(1)(b) of the Merchant Marine Act of 1920, 46 U.S.C. Section 876(1)(b). In that proceeding, O.N.E. sought to have the FMC issue regulations under 46 CFR Part 585 to meet conditions allegedly unfavorable to shipping in the foreign trade of the United States.[5]

O.N.E.'s petition stated as follows:

> The cargo preference laws of Colombia have severely damaged O.N.E.'s financial position to the

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into in the United States by United States citizens which sought to monopolize trade in the United States. *See United States v. Sisal Sales Corp.*, 274 U.S. 268, 276 (1927); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 698-99, 704 (1962).

Furthermore, the Court noted in *Continental Ore* that there was no indication of foreign government approval of the actions in question. 370 U.S. at 706.

5 46 CFR 585.8 provides that:

> Upon the filing of a petition, or on its motion when there are indications that conditions unfavorable to shipping in the foreign trade of the United States may exist, the Commission will notify the Secretary of State that such conditions apparently exist, and may request [that the Secretary] seek resolution of the matter through diplomatic channels.

> point of desperation. O.N.E. hereby asks the Commission to act immediately under Section 19 of the Merchant Marine Act of 1920, without further delay and to avoid further irreparable harm to petitioner, to suspend the tariffs of and preferential agreements by and between all Colombian carriers in this trade and/or prohibit transport of any import/export of liquid bulk products to/from Colombia/United States of America.

These allegations and claims of harm are in essence the same as those pleaded in this action. Clearly, Colombia's cargo reservation laws are alleged to be at the core of that harm. O.N.E. brought a proceeding before the FMC to remedy this alleged injury, and the mechanism invoked is one intended to preserve harmonious relations among nations while giving the injured party a possible remedy. The relevant FMC regulations stress the resolution of disputes through diplomatic channels. In these circumstances, the district court was clearly correct in concluding that courts should avoid the unnecessary irritant of a private antitrust action.[6]

The dismissal of the complaint is affirmed.

Rule 11 Sanctions

The district court imposed sanctions of $500 against appellant for bringing motions to set aside the judgment

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6 On July 17, 1987, O.N.E. withdrew its petition for relief under Section 19 of the Merchant Marine Act, 1920, then pending before the Federal Maritime Commission (FMC) and requested that the Commission proceeding be discontinued. The FMC discontinued the proceeding without prejudice.

on the basis of "newly discovered evidence" and for an amendment of the judgment entered to reflect the disposition of its motion for a partial summary judgment. The district judge ruled:

> "Plaintiff O.N.E. Shipping has requested reargument and reconsideration of my previous Memorandum and Order, dated May 22, 1986, dismissing its complaint. Reconsideration is granted, but upon reconsideration plaintiff's requests to set aside the judgment and to amend it to reflect the fact that plaintiff made a motion for partial summary judgment, and to decide that motion are denied."

Having entertained plaintiff's application for reargument on and reconsideration of the Order dismissing the complaint, there is no basis in this record for having imposed sanctions under Rule 11 on the notion that the application was frivolous, as contemplated for the imposition of sanctions.

In the circumstances, the grant of the applications made by the plaintiff was equivalent to a tacit acknowledgment that a basis existed for consideration by the court of the relief sought. Sanctions are not to be imposed for unsuccessful litigation of a cognizable claim. The failure of the court to delineate specific facts demonstrating improper use of the motion alone undermines the imposition of sanctions herein. *See Dow Chemical Pacific, Ltd. v. Rascator Maritime S.A.*, 782 F.2d 329, 344 (2d Cir. 1986).

The award of sanctions is reversed.

CARDAMONE, *Circuit Judge*; dissenting:

The question raised on this appeal is whether a federal court should exercise anti-trust jurisdiction over conduct that, aided by foreign protectionist legislation, brings about unlawful consequences in the United States. The majority says "no". Respectfully, I disagree.

Applying the balancing tests of *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*, 549 F.2d 597 (9th Cir. 1976) and *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979), the district court concluded that because of Colombia's strong interest in its protectionist legislation and because of the Colombian government's ownership interest in Flota through the National Federation of Coffee Growers, there would be probable adverse effects upon our foreign relations were it to assert jurisdiction. Given its dismissal on comity grounds, the district judge did not decide whether O.N.E.'s complaint should be dismissed under the Foreign Trade Antitrust Improvements Act of 1982, Pub. L. No. 97-290, 96 Stat. 1246, 15 U.S.C. § 6a (1982) (Act), though it added, without discussion, that the Act did not appear to deprive it of jurisdiction. Relying on well-settled act of state doctrine principles, the majority affirmed the district court's dismissal on comity grounds. Because I do not believe that this case should be dismissed under the Act or on comity grounds, I dissent.

A. *The Foreign Antitrust Improvements Act*

To understand Congress' purpose in this area, it is necessary to examine the 1982 Act. Section 402 of the statute provides that United States antitrust laws:

> shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—
>
> (1) such conduct has a direct, substantial, and reasonably foreseeable effect—
>
> (A) on trade or commerce which is nor trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; . . .

15 U.S.C. § 6a (1982).

Under this statute Congress excluded from the coverage of U.S. antitrust laws conduct involving export commerce and purely foreign transactions unless such conduct has a "direct, substantial, and reasonably foreseeable effect" on domestic commerce, import commerce or the export trade or commerce of a person "engaged in such trade or commerce in the United States." Congress aimed to clarify existing American law, and when defining the Act's scope used the phrase "commerce . . . with foreign nations", which is precisely the same terminology as that used in § 1 of the Sherman Act. 15 U.S.C. § 1 (1982). In that context, the phrase has consistently been construed to cover international transportation cases. *See, e.g., Thomsen v. Cayser*, 243 U.S. 66, 88 (1917); *United States v. Pacific & Arctic Ry. & Navig. Co.*, 228 U.S. 87, 105-06 (1913); *Joseph Muller Corp.*, 451 F.2d at 729. Thus, the Act extends to international shipping of the sort involved here.

To say that the Act applies to foreign shipping cases is not to say that it is easily applied. For t'nough shipping

goods from the United States is clearly foreign commerce, it does not fall neatly into those categories set out in the Foreign Antitrust Improvements Act. O.N.E. argues that the Act does not deprive the courts of jurisdiction over this case because the conduct alleged falls under the exception for conduct having the required effect on "export trade or export commerce . . . of a person engaged in such trade or commerce in the United States." 15 U.S.C. § 6a(1)(B). O.N.E. assumes that the service of transporting goods from the U.S. is itself "export commerce" and offers its various ties with the U.S.—for example, its U.S. parent and its U.S. derived income—as proof that it is a "person engaged in . . . [export] commerce in the United States." Appellees counter that the transactions do not fall under (1)(B) because as a non-U.S. corporation O.N.E. lacks the indicia of a "person engaged in . . . [export] commerce in the United States." Thus, appellees continue, the Act deprives the courts of jurisdiction over this case.

Both of these contentions are incorrect in several respects. First, the commerce involved here is import rather than export commerce; U.S. corporations import from foreign flag lines the service of shipping their goods from the United States to Colombia. *See Pacific Seafarers, Inc. v. Pacific Far East Lines*, 404 F.2d 804, 813 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1093 (1969) ("[M]aritime nations . . . providing transportation services . . . are engaged . . . in the 'export' of shipping services."). The conclusion that the transportation at issue here is "import" rather than "export" commerce is consistent with the Act's legislative history. The drafters of the Act had as their primary concern "preserv[ing] antitrust protections in the domestic marketplace." H.R. Rep. No. 686, 97th

Cong., 2d Sess. 10, *reprinted in* 1982 U.S. Code Cong. & Admin. News 2487, 2498 (House Report). The record amply demonstrates that a market exists among United States corporations for the service of shipping LBC to Latin America. Viewed as an import, the service of transporting goods from the U.S. is not excluded by the Act from the coverage of American antitrust laws. The Act explicitly states that it does not apply to "import trade or import commerce." 15 U.S.C. § 6a.

Second, even if the shipment of LBC from the United States is "export commerce", appellees' alleged conduct is still subject to U.S. antitrust laws because it falls under the Act's exception 1(B) for conduct having a "direct, substantial, and reasonably foreseeable effect . . . on export trade . . . of a person engaged in such . . . commerce in the United States." The legislative history defines "a person engaged in [export] trade or commerce in the United States" as a person "doing business in the United States." House Report, *supra*, at 10, 12. Because Congress strongly emphasized that the Act was intended to preserve antitrust protection for the domestic market, *see* House Report, *supra*, at 9, 10, 11, and because O.N.E. participates in the domestic market for shipping services, it satisfies this "doing business" requirement.

Finally, federal courts have long taken jurisdiction over shipping services between the United States and abroad. *See, e.g., Thomsen*, 243 U.S. at 88; *Pacific & Arctic Ry. & Navig. Co.*, 228 U.S. at 101. Thus, the language of the Act and its legislative history makes it obvious that Congress did not aim to deprive federal courts of jurisdiction over suits like the instant one.

B. *International Comity Considerations and Extraterritorial Antitrust Jurisdiction*

Yet, despite Congress' aim that there be jurisdiction, the majority holds that the case should be dismissed on international comity grounds because of Colombia's significant interest in implementing its cargo reservation law. The majority suggests that U.S. and Colombian interests should be weighed in order to determine whether jurisdiction exists over O.N.E.'s complaint. The Ninth Circuit in *Timberlane*, 549 F.2d 597, and the Third Circuit in *Mannington Mills*, 595 F.2d 1287, have each set forth a list of factors[1] to be considered in determining "whether the interests of, and links to, the United States . . . are sufficiently strong, vis-a-vis those of other nations, to justify an assertion of extraterritorial authority." *Timberlane*, 549 F.2d at 613.

1. *The Scope of Extraterritorial Antitrust Jurisdiction*

Courts have often grappled with the precise standard to be employed in determining whether American antitrust

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1 The factors enumerated in *Timberlane* are:

1. the degree of conflict with foreign law or policy,
2. the nationality or allegiance of the parties and the locations or principal places of business of corporations,
3. the extent to which enforcement by either state can be expected to achieve compliance,
4. the relative significance of effects on the United States as compared with those elsewhere,
5. the extent to which there is explicit purpose to harm or affect American commerce,
6. the foreseeability of such effect, and
7. the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.

549 F.2d at 614.

law should apply to a particular extraterritorial transaction. As Judge Learned Hand wrote over 40 years ago in *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) (on certification from the Supreme Court), "[w]e should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States." *Id.* at 443. *Alcoa* established that in determining when Congress has chosen "to attach liability to the conduct outside the United States of persons not in allegiance to it," one must look to the effects upon U.S. commerce. *Id.* Since *Alcoa*, different formulations of the "effects" text have been advanced.

In an effort to provide a single standard to determine whether American antitrust laws apply to a given extraterritorial transaction, the Act of 1982 was passed. Con-

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The ten factors listed in *Mannington Mills* are:

1. Degree of conflict with foreign law or policy;
2. Nationality of the parties;
3. Relative importance of the alleged violation of conduct here compared to that abroad;
4. Availability of a remedy abroad and the pendency of litigation there;
5. Existence of intent to harm or affect American commerce and its foreseeability;
6. Possible effect upon foreign relations if the court exercises jurisdiction and grants relief;
7. If relief is granted, whether a party will be placed in the position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries;
8. Whether the court can make its order effective;
9. Whether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances;
10. Whether a treaty with the affected nations has addressed the issue.

595 F.2d at 1297-98.

gress deliberately refrained from adopting *Timberlane*'s judicial balancing of the interests of the nations involved. The House Committee report, citing *Timberlane*, disclaimed any intent "to prevent [or] encourage additional judicial recognition of the special international characteristics of transactions." House Report at 13.

It was left to the courts to decide how to employ notions of international comity in extraterritorial antitrust cases. Using this grant of power, the majority concludes that jurisdiction should not be exercised on account of comity considerations and the probable adverse effect upon United States relations with the Republic of Colombia. The primary factor relied upon—Colombia's significant interest in its cargo reservation laws—seems to be insufficient to preclude jurisdiction under controlling Supreme Court precedents. Our highest Court has twice addressed the effect of United States antitrust laws on anticompetitive conduct allegedly aided by foreign protectionist legislation. In both cases it held that such assistance did not oust federal courts from jurisdiction on comity grounds.

2. *Controlling Supreme Court Precedents*

In *United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927), the defendants, Comision Exportadora de Yucatan, a public agency that purchased sisal from Mexican producers, and Sisal Sales Corp., its exclusive sales agent, had utilized the discriminatory legislation of the Yucatan to monopolize the importation and sale of sisal into the United States. The legislation imposed special taxes designed to drive other purchasers out of the sisal market, leaving Comision Exportadora as the sole sisal purchaser in the Yucatan. The Supreme Court, in finding jurisdic-

tion over this conspiracy, observed: "True, the conspirators were aided by discriminating legislation, but by their own deliberate acts, here and elsewhere, they brought about forbidden results within the United States. They are within the jurisdiction of our courts and may be punished for offenses against our laws." *Id.* at 276.

More recently, in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962), the Supreme Court again found jurisdiction despite the role of another nation's discriminatory legislation in an alleged restraint of trade. In that case, one of the defendants, Electro Metallurgical Company of Canada (Electro Met), had been appointed by the Canadian government as the exclusive wartime purchasing agent for all of the vanadium required by Canadian industry. Plaintiff Continental Ore alleged that Electro Met, at the behest of its American parent, Union Carbide, used its position to exclude Continental Ore from the Canadian vanadium market. In finding jurisdiction, the Court relied on *Sisal Sales* stating that jurisdiction may be found "even though the defendants' control of . . . production was aided by discriminatory legislation of the foreign country which established an official agency as the sole buyer of the product . . . ." *Id.* at 705.

The Supreme Court went on to note that "[t]here is nothing to indicate that [Canadian] law in any way compelled discriminatory purchasing, and it is well settled that acts which are in themselves legal lose that character when they become constituent elements of an unlawful scheme." *Id.* at 707. It also stated that "there is no indication that . . . any . . . official within the structure of the Canadian Government approved or would have approved of joint efforts to monopolize the production

and sale of vanadium or directed that purchases from Continental be stopped." *Id.* at 706.

3. *Application of Supreme Court Precedents*

The facts before us parallel those of *Sisal Sales* and *Continental*. In both cases, the alleged restraint of trade was possible only because of the discriminatory laws of a foreign sovereign. Also, in all three cases, one of the defendants—here Flota—was found to be an agent of that sovereign. In one respect, the instant case is even more conducive to an assertion of jurisdiction than either *Sisal Sales* or *Continental*. In those cases the governments ceded a greater degree of control over the commerce in question to the defendants, while in the instant case, in contrast, Flota and its associates were not singled out for special treatment, but received preferences along with all other Colombian flag lines. Further, only 50 percent of the trade involved was set aside in the case at bar while the entire vanadium trade was restricted in *Continental*. For these reasons, this case falls squarely within the holdings of *Continental* and *Sisal Sales* and should not be dismissed on comity grounds.

In one respect this case might arguably be distinguishable from *Continental*. In that case, as noted, the Supreme Court observed that there was no evidence that Canada had approved the effort to monopolize the vanadium trade. Here, the Colombian government has expressed approval in two ways which must be considered. Colombia initially approved the agreements creating the association among the appellees, and it sent telexes to the United States State Department urging it to intervene on the appellees' behalf before the FMC.

Neither action should cause a dismissal on account of comity. The approval of the agreements are not of the type contemplated by *Continental*. In *Continental*, the Canadian government clearly "approved" of the power defendants had in the vanadium market because it had granted them that power. But the government did not express its consent to their attempt to monopolize the market. Similarly, here the initial assent by the Colombian government may have given appellees a degree of power over LBC commerce, but there is no indication that in approving the agreements Colombia considered their antitrust implications.

Nor do the telexes compel a different conclusion. Although these telexes may demonstrate some sort of official blessing of the anticompetitive effects of appellees' conduct—since they were sent after U.S. corporations had filed objections with the FMC—they should not be considered when determining jurisdiction. As Kingman Brewster, the commentator who devised the doctrine of judicial comity balancing, observed: "reliance on case-specific foreign policy concerns would create problems of fairness and consistency. . . . Disparities in rulings would . . . reward foreign governments that bellow at every threat of antitrust enforcement . . . ." 1 J. Atwood & K. Brewster, *Antitrust and American Business Abroad* § 6.18, at 175-76 (2d ed. 1981). *Cf. United States v. The Watchmakers of Switzerland Information Center, Inc.*, 1963 Trade Cas. (CCH) ¶ 70,600, at 77,456-57 (S.D.N.Y. 1962) (government approval of private activity does not deprive court of jurisdiction). Further, a consideration of these telexes in determining jurisdiction would unduly involve courts in foreign policy concerns. It is especially significant here that the United States State

Department—despite a request to do so from the Colombian government—chose *not* to intervene on appellees' behalf before the FMC. Hence, the majority's notions of comity towards Colombia should not effectively reverse the settled holdings of the United States Supreme Court.

C. *Conclusion*

In sum, despite the aid of foreign protectionist legislation, Flota and its associates' actions brought about unlawful consequences in the United States for which they should be answerable in federal court. Since the facts of the instant case fall plainly within controlling Supreme Court precedents, I must dissent from the majority's affirmance of the district court's dismissal of the complaint for want of jurisdiction on the grounds of comity and vote instead to reverse and remand the case to the district court for further proceedings on the merits.

Opinion of the District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

O.N.E. SHIPPING, LTD.,

Plaintiff,

-against-

FLOTA MERCANTE GRANCOLOMBIANA, S.A., ANDINO CHEMICAL SHIPPING, INC., and MARITIMA TRANSLIGRA, S.A.,

Defendants.

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84 Civ. 7825 (KTD)

MEMORANDUM & ORDER

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KEVIN THOMAS DUFFY, D.J.:

Plaintiff, O.N.E. Shipping, Ltd. ("O.N.E."), brings this action against defendants, Flota Mercante Grancolombiana, S.A. ("Flota"), Andino Chemical Shipping, Inc. ("Andino"), and Maritima Transligra, S.A. ("Transligra"), for violations of the federal antitrust laws. Defendants now move to dismiss the antitrust claims (1) pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction, (2) for lack of jurisdiction based on principles of international comity, (3) pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim on which relief can be granted, and (4) as time-barred. For the reasons that follow, defendants' motion to dismiss for lack of jurisdiction based on principles of international comity is granted.

Facts

The facts, as set forth in the complaint and the affidavits submitted by the parties, are as follows. O.N.E. is a Bermudian corporation with offices in the United States. In the early 1970's, O.N.E. and its predecessor corporation regularly served ports in Central and South America, including Colombia, with shipments of liquid bulk cargo "LBC"),[1] from the United States.

Flota is a Colombian corporation with offices in New York. Apparently, Flota is an "agency or instrumentality"

of the Colombian Government within the meaning of the Foreign Sovereign Immunities Act of 1976. 28 U.S.C. § 1603(b). Andino is a foreign corporation wholly owned by Holland Chemical International and has offices in New York. Transligra is an Equadorian corporation also having offices in New York. Flota and Andino each own one-third of Transligra. Andino and Transligra are engaged in the shipment of LBC from the United States to Colombia. Ocean shipping is the primary means of transporting LBC between the United States and Colombia.

In 1969, the Colombian Government enacted a "Cargo Reservation Law" ("Reservation Law") which ultimately required that the first fifty percent of all shipments for import into Colombia be transported on Colombian owned or associated vessels or on vessels which fly the flag of the exporting country. Prior to Flota's entering the LBC trade, the market was unaffected by the Reservation Law. In 1973, Flota and Andino entered into an agreement whereby Andino would become associated with Flota so that Andino's vessels would be able to satisfy the Reservation Law. Subsequently, Andino shipped LBC under Flota bills of lading. The 1973 agreement was filed with and approved by the Colombian Government. An announcement of the agreement was made in a publication entitled *Diario Oficial* on June 8, 1973. Flota also announced its new involvement in the trade between Colombia and the United States in a publication entitled *El Tiempo*. O.N.E. alleges it did not learn of the 1973 agreement until 1980 during discovery proceedings.

In 1973, Flota and Lykes, a United States flag carrier, agreed that Lykes would have equal access to the Colombian market. An an unspecified later date, Lykes agreed with O.N.E. to issue bills of lading for LBC carried by O.N.E. Flota opposed this relationship and Lykes did not carry out its plans with O.N.E. According to plaintiff this was done because Lykes sought to preserve its relations with Flota in the trade.

On or about December 22, 1976, Flota and Andino entered into another agreement, in which Andino would ship LBC to the Atlantic coast of Colombia. Flota, Andino, and Transligra agreed that Transligra would use Andino vessels to ship LBC to Colombia's Pacific coast. Under supplemental private ageements between the parties, Flota and Transligra would issue bills of lading to shippers of LBC, and Andino would act as sole coordinator and sole supplier of tonnage in connection with all shipments originating in the United States Gulf coast.

Because LBC shipments to Colombia are relatively small and the rates vary in an inverse proportion to the size of the shipments, economies of scale dictate that shipments be consolidated and not divided. With respect to Flota, the 1973 and 1976 agreements, together with the Reservation Law, allowed it to obtain an eighty percent share of the LBC trade from the United States Gulf to Colombia.

On or about April 14, 1977, Flota and Andino sought an exemption from the antitrust laws by seeking approval by the Federal Maritime Commission ("FMC") of the 1976 agreements. The FMC initially disapproved the agreements and subsequently granted an investigation and hearing. On May 23, 1983, Administrative Law Judge ("ALJ"), Charles E. Morgan, also disapproved the agreements. On appeal, on May 30, 1984, the full FMC affirmed the decision of the ALJ. The FMC ruled that the agreements were anticompetitive, that they artificially increased transportation rates, and that they were detrimental to United States commerce. O.N.E. now charges defendants with an unlawful concerted refusal to deal, a conspiracy to exclude competitors, unlawful exclusive dealing, a conspiracy to fix prices, a conspiracy to divide markets and allocate customers, and an attempt and a conspiracy to monopolize.

Discussion

Defendants moved to dismiss plaintiff's complaint for lack of subject matter jurisdiction (1) under the Export Trading Company Act of 1982 (the "ETC Act" or the "Act"), 15 U.S.C. § 6a (1982), and (2) based on comity. Because I find that I have no jurisdiction over this action because of principles of comity, I need not decide specifically whether jurisdiction exists under the ETC Act.[2]

Courts apply principles of comity as part of either the threshold jurisdictional determination of the antitrust laws or as part of a later determination on whether to abstain from jurisdiction. *See Dominicus Americana Bohio v. Gulf & Western Industries, Inc.*, 473 F. Supp. 680, 688 (S.D.N.Y. 1979) (citing *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1294-98 (3d Cir. 1979)). In either case, there must be a balancing of the interests of the United States in asserting jurisdiction against the international implications arising from such assertion. *See Timberlane Lumber Co. v. Bank of America N.T. & S.A.*, 549 F.2d 597, 613 (9th Cir. 1977); *Dominicus Americana Bohio*, 473 F. Supp. at 687. In *Timberlane*, the Ninth Circuit set forth the following factors to consider when examining the question of comity:

> [T]he degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principal places of business of corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.

549 F.2d at 614 (footnote omitted). The Third Circuit has articulated the elements to be considered as follows:

1. Degree of conflict with foreign law or policy;
2. Nationality of the parties;
3. Relative importance of the alleged violation of conduct here compared to that abroad;
4. Availability of a remedy abroad and the pendency of litigation there;
5. Existence of intent to harm or affect American commerce and its foreseeability;
6. Possible effect upon foreign relations if the court exercises jurisdiction and grants relief;
7. If relief is granted, whether a party will be placed in the position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries;
8. Whether the court can make its order effective;
9. Whether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances;
10. Whether a treaty with the affected nations has addressed the issue.

Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d at 1297-98 (footnote omitted).

O.N.E. argues that comity does not apply under the Second Circuit's ruling in *National Bank of Canada v. Interbank Card Association*, 666 F.2d 6 (2d Cir. 1981). O.N.E., however, misconstrues *National Bank of Canada*, which did not question the propriety of refusing jurisdiction under principles of comity. *See* 666 F.2d at 8. Instead, the Court determined that jurisdiction was unavailable because plaintiff failed to show substantial effects on United States commerce. *See id.* Thus, the Second Circuit did not conclude as plaintiff contends, that once substantial effects

are shown, no further inquiry is necessary. The Court simply did not address the issue of whether to apply comity.

O.N.E., a Bermudian corporation, argues that even if comity applies, jurisdiction exists because of the substantial effects of defendants' acts on the United States and the absence of conflict between United States and Colombian law. O.N.E's strongest argument is based on the FMC's finding of anticompetitive effects of defendants' agreement on United States commerce. I find, however, that Colombian interests outweigh whatever antitrust enforcement interests the United States may have in this case as a matter of law.

The Colombian legislature enacted Colombia's Reservation Law in order to promote economic development in that country. In order to achieve the most effective application of its law, Colombia has placed significant oversight responsibilities in the office of the Director of General Maritime and Port Matters (the "Director") and in the Colombian Ministry of Economic Development ("Colombian Ministry"). For example, the Institute of Foreign Trade within the Colombian Ministry has the authority to waive the Reservation Law in order to maintain adequate service to Colombia. The defendant Flota was required to obtain approval from the Director for the privilege to serve the trade route in issue. Additionally, it should be noted that Flota is a Colombian corporation and is substantially owned by the National Federation of Coffee Growers, a public organization. Enforcement of this antitrust action would appear to adversely impact the Colombian Government's program to develop its coffee growing regions.

Based on the Colombian Government's significant ownership interest in Flota and based on Colombia's interest in implementing its Reservation Law, I find that there are probable adverse "effect[s] upon foreign relations if the court asserts jurisdiction and grants relief." *See Mannington Mills*, 595 F.2d at 1297. Were this court to grant relief,

Colombian authorities would be encouraged to disrespect analagous trade promotion laws of the United States. Enforcement of our antitrust laws to protect the interests of a foreign corporation as in this instance might also result in direct conflict with our foreign policy. If the relief sought were granted, Colombian shippers would be deterred from achieving the advantage in the trade which the Reservation Law seeks to promote and there would be no direct benefit to this country.

Finally, the fact that plaintiff and defendants are all foreign corporations weighs in favor of refusing jurisdiction. After stating that it could enforce a judgment in the United States, O.N.E. admits that it is "less certain" whether it could enforce a judgment in Colombia. O.N.E. also argues that the defendants had an explicit purpose to effect American commerce and that the defendants could foresee the harmful consequences of their action. Even taking these arguments into consideration, however, I find that the negative repercussions of granting relief in this case would far outweigh the potential benefits to United States interests. Consequently, I grant defendants' motion to dismiss for lack of jurisdiction based on principles of international comity.

I do not pass upon those parts of defendants' motion which question whether the complaint states a cause of action or whether the case is time-barred.

SO ORDERED.

DATED: New York, New York
May 22, 1986

/s/ Kevin Thomas Duffy

KEVIN THOMAS DUFFY, U.S.D.J.

FOOTNOTES

1. Liquid bulk cargo refers to liquid materials such as chemicals and vegetable oils which are usually transported in commerce by specially equipped tankers.

2. I do note that, after a cursory review of the matter, the ETC Act would not appear to provide a basis for refusing to exercise jurisdiction over this action.

The ETC Act limits antitrust jurisdiction over foreign commerce by providing that the antitrust laws:

> shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—
>
> (1) such conduct has a direct, substantial, and reasonably foreseeable effect—
>
> (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
>
> (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and
>
> (2) such effect gives rives to a claim under the provisions of sections 1 to 7 of this title, other than this section.
>
> If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business *in the United States.*

Id. (emphasis added). Congress's general intent under the Act was both to adopt a unified standard which would exempt from the antitrust laws conduct lacking in the requisite effect on United States commerce and to help promote exports from the United States. H. Rep. No. 97-686, 97th Cong., 2d Sess. 2-3, *reprinted in,* 1982 U.S. Code Cong. & Ad. News 2487-88.

The language of the ETC Act indicates that a person whose export trade is impacted must be engaged in such trade "in the United States." The legislative history of the Act contemplates that domestic exporters have the opportunity to bring suit. 1982 U.S. Code Cong. & Ad. News at 2495-96; *see Eurim-Pharm Gmbh v. Pfizer, Inc.*, 593 F. Supp.

1102, 1106 n.5 (S.D.N.Y. 1984). The legislative history also states, and O.N.E. concedes, that the antitrust effect must impact "the export commerce of a U.S. resident." *See* 1982 U.S. Code Cong. & Ad. News at 2513-14; Plaintiff's Memo at 36. However, a foreign firm which has suffered injury to its nondomestic operations would have no remedy. 1982 U.S. Code Cong. & Ad. News at 2496.

Although it is not clear whether O.N.E. should be considered a domestic exporter for the purposes of the Act, there presently apears to be a sufficiently close factual question on this issue to preclude refusal to exercise jurisdiction on this basis alone. O.N.E. asserts, *inter alia*, that, although it is a Bermudian Corporation, it has derived 10% to 35% of its income from United States sources as defined under the Internal Revenue Code, and that it pays 10% of its annual earnings to the United States in income taxes. O.N.E. further asserts that it has offices and does business in New York, and that it advertises and secures contracts of affreightment in the United States.

Finally, O.N.E. seems prepared to show a "direct, substantial, and reasonably foreseeable effect . . . on export trade or export commerce." This impression is based primarily on the FMC's determination that defendants' actions were "contrary to the public interest" and "detrimental to the commerce of the United States."

Opinion of the District Court on Reargument

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

O.N.E. SHIPPING, LTD.,

Plaintiff,

-against-

FLOTA MERCANTE GRANCOLOMBIANA, S.A., ANDINO CHEMICAL SHIPPING, INC., and MARITIMA TRANSLIGRA, S.A.,

Defendants.

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84 Civ. 7825 (KTD)

MEMORANDUM & ORDER

APPEARANCES:

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Opinion of the District Court on Reargument

KEVIN THOMAS DUFFY, D.J.:

Plaintiff O.N.E. Shipping has requested reargument on and reconsideration of my previous Memorandum and Order, dated May 22, 1986, dismissing its complaint. Reconsideration is granted, but upon reconsideration plaintiff's requests to set aside the judgment and to amend it to reflect the fact that plaintiff made a motion for partial summary judgment, and to decide that motion are denied.

MOTION TO SET ASIDE THE JUDGMENT

Plaintiff moves to set aside my previous order pursuant to Fed. R. Civ. P. 60(b)(2) which provides for relief from an order based on "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." Rule 59(b) permits such a motion "not later than 10 days after the entry of the judgment."

Plaintiff presents two pieces of "newly discovered evidence" in support of its motion. The first is the affidavit of Daniel Campbell, general manager of Overseas Shipping and Logistics of Louisiana, Inc., ("O.S.&L."), a corporation engaged in international transportation of merchandise. In his affidavit Campbell asserts that he was told that defendant Flota Mercante Grancolombiana ("Flota") was responsible for O.S.&L.'s difficulty in obtaining approval to transport machinery and equipment to Columbia. The second piece of evidence is a Report and Order by the Federal Maritime Commission, (the "Commission"), approving for an antitrust exemption, an equal access agreement between the defendant Flota and another international transport corporation.

To prevail on a motion to set aside an order based on newly discovered evidence under Rule 60(b)(2), plaintiff must meet the following five requirements:

(1) the evidence was discovered following the original proceeding;

(2) despite plaintiff's due diligence, the evidence was not discoverable in time to present it in the original proceeding;

(3) the evidence is material, admissible, and credible;

(4) the evidence is not merely cumulative or impeaching; and

(5) upon reconsideration the evidence is likely to change the outcome of the original proceeding.

Rosebud Sioux Tribe v. A & P Steel, Inc., 733 F.2d 509, 515 (8th Cir. 1984), *cert. denied*, 469 U.S. 1072 (1984); *Peacock v. Board of School Comm'rs*, 721 F.2d 210, 213-14 (7th Cir. 1983); *United States v. Walus*, 616 F.2d 283, 287-88 (7th Cir. 1980); *Johnson Waste Materials v. Marshall*, 611 F.2d 593, 597 (5th Cir. 1980).

Plaintiff learned of O.S.&L.'s complaints with Flota on June 16, 1986, and claims that it only "recently came across" the Commission's Report and Order. While Campbell's affifdavit was made after my decision on the prior motions, the Commission's Report and Order appears to have been in existence since at least 1978. Thus, although plaintiff only "recently came across" it, the Report and order should have been discovered and presented in the original motion papers.

Plaintiff simply asserts that its new evidence was discovered after my first order was entered. It presents no evidence showing that it exercised due diligence to discover the evidence in time to present it in the original proceeding. "Unexcused failure to produce the relevant evidence at the original trial can be sufficient without more to warrant denial of a Rule 60(b)[(2)] motion." *Kentucky Fried Chicken v. Diversified Packing Corp.*, 549 F.2d 368, 391 (5th Cir. 1977). This same reasoning applies as well to motions for summary judgment as to trials.

Even if plaintiff could produce satisfactory evidence to prove its due diligence, the new evidence does not support plaintiff's motion to set aside the prior order. It is difficult to imagine how Mr. Campbell's affidavit is material to this case. The affidavit offers evidence that O.S.&L. has suffered because of Flota's allegedly anti-competitive conduct. This evidence involves a party not related to this suit, and a different market and time period than those alleged in plaintiff's complaint; it is immaterial to this case. Similarly, the Commissioner's Report and Order involves an equal access agreement between the defendant and a party not involved in this suit. Unlike the agreements involved here, that agreement was approved by the Commission for antitrust exemption. It is unclear how this evidence affects plaintiff's case; indeed, it is nowhere mentioned in plaintiff's arguments in support of its motion.

Thus, plaintiff's "newly-discovered evidence," even if it was not obtainable earlier through due diligence, is immaterial to this case, and is certainly not likely to change the outcome of my original decision. Therefore, plaintiff's motion to set aside the judgment based on newly discovered evidence is denied.

MOTION TO AMEND THE JUDGMENT

Plaintiff also moves to amend the judgment entered in this case to reflect the disposition of its motion for a partial summary judgment. Plaintiff's complaint was dismissed for lack of jurisdiction based on the doctrine of international comity. Absent jurisdiction, an Article III judge has no power to determine summary judgment motions. Therefore, plaintiff's motion pursuant to Fed. R. Civ. P. 59(e) to amend the judgment to reflect the fact that it made a motion for partial summary judgment, and to decide that motion, is denied.

Rule 11 sanctions will be imposed in the amount of $500 against the movant-plaintiff, as partial payment of attorney's fees for defense counsel in defending this motion.

Dated: New York, New York
October 22, 1986

/s/ Kevin Thomas Duffy

KEVIN THOMAS DUFFY, U.S.D.J.

Judgment of the District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

O.N.E. SHIPPING, LTD.,

Plaintiff,

-against-

FLOTA MERCANTE GRANCOLOMBIANA, S.A., ANDINO CHEMICAL SHIPPING, INC., and MARITIMA TRANSLIGRA, S.A.,

Defendants.

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84 Civ. 7825 (KTD)

JUDGMENT

Defendants having moved to dismiss pursuant to Rule 12(b)(1) and 12(b)(6), Fed.R.Civ.P., and the said motion having come before the Honorable Kevin Thomas Duffy, U.S.D.J., and the Court thereafter on May 23, 1986, having handed down its Memorandum & Order granting defendants' motion to dismiss for lack of jurisdiction, it is

ORDERED, ADJUDGED AND DECREED: That the complaint be and it is hereby dismissed.

DATED: NEW YORK, NEW YORK
May 29, 1986

/s/ Raymond F. Burghardt

CLERK

THIS DOCUMENT WAS ENTERED ON THE DOCKET ON 05-29-86.

Order Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the tenth day of November one thousand nine hundred and eighty-seven.

O.N.E. SHIPPING, LTD.,

Plaintiff-Appellant,

-v.-

FLOTA MERCANTE GRANCOLOMBIANA, S.A., ANDINO CHEMICAL SHIPPING, INC., and MARITIMA TRANSLIGRA, S.A.,

Defendants-Appellees.

No. 86-7988

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by plaintiff-appellant, O.N.E. Shipping Ltd.,

Upon consideration by the panel that heard the appeal, it is

ORDERED that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ Elaine B. Goldsmith
Elaine B. Goldsmith,
Clerk